INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
Date of decree	2
Application for appeal	2
Statement	2
Authorities sustaining jurisdiction	6

Table of Cases Cited.

Equitable Life v. King, 178 Ark. 293	4
Inter-Southern Life Insurance Company v. McElroy, 38 F. (2d) 557	5
Life and Casualty Insurance Company of Tennessee v. McCray, No. 89, October Term, 1933	3
New York Life Insurance Company v. Adams, 155 Ark. 123	4
Security Life Insurance Company v. Leeper, 171 Ark. 77	4
Standard Life Ins. Co. v. Rossi, 35 F. (2d) 667	6
Supreme Ruling of Mystic Circle v. Snyder, 227 U. S. 497	6
Windsor v. McVeigh, 93 U. S. 274	5
Woodson v. Railroad, 134 U. S. 661, 33 L. Ed. 1032	5

Statutes Cited.

Act of February 13, 1925, 43 Stat. 937 (U. S. Comp. Stat., Sec. 1214)	1, 6
Constitution of the United States, Article I, Section 10	3
14th Amendment	3, 6
Crawford & Moses' Digest of the Statutes of Arkansas, Section 6155	2, 4, 6

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 509

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, APPELLANT,

vs.

ALBERT BAREFIELD, APPELLEE.

STATEMENT OF JURISDICTION AS REQUIRED BY PARAGRAPH 1 OF RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.

Jurisdiction.

The Act of Congress, February 13, 1925, 43 Stat. 937; U. S. Comp. Stat. Sec. 1214 gives appellant the right of appeal direct to the Supreme Court of the United States from the judgment of the highest court of a State where the constitutionality of a State statute is drawn in question as being repugnant to the Constitution of the United States and the decision of the State court is in favor of its validity.

The Supreme Court of Arkansas is the highest court in that State and the judgment sought to be appealed from is final.

Date of Decree.

The date of the final judgment in the Supreme Court of Arkansas is June 26, 1933.

Application for Appeal.

Application for appeal to the Supreme Court of the United States was presented to the Chief Justice of the Supreme Court of Arkansas on July 12, 1933, and was denied by him on July 19, 1933.

(The appeal was allowed by Mr. Justice Butler on August 17th.)

Statement.

This suit was brought by appellee, Albert Barefield, against appellant, Life & Casualty Insurance Company of Tennessee, to recover upon a Travel and Pedestrian Accident Policy and a recovery was had for the sum of $1,625. There was added to this judgment the sum of $162.50 and 12 per cent penalty of $195.

The said attorney's fees and penalty were added to this judgment under the provision of Section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas, which is as follows:

> "In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent damages upon the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of said loss; said attorney's fees to be taxed by the court where the same is heard on original action, by

appeal or otherwise, and to be taxed up as a part of the costs therein and collected as other costs are, or may be by law, collected."

The construction placed by the Supreme Court of Arkansas upon this statute was that it imposed these penalties upon your petitioner without reference to whether or not it acted in good faith in refusing to pay and in defending the suit. Your petitioner contended before the Supreme Court of Arkansas and now contends that this statute thus construed violates the Constitution of the United States in two particulars: (1) it violates Article 1, Section 10, forbidding the passage of any law "impairing the obligations of contracts"; and (2) the Fourteenth Amendment forbidding any State to "deprive any person of life, liberty or property, without due process of law."

As applied to Article 1, Section 10, your petitioner contends that requiring it to pay the sum of One Hundred Ninety-Five (195) Dollars in addition to the amount of Sixteen Hundred Twenty-Five (1625) Dollars imposed by the contract, is impairing the obligation of the contract, and that placing a penalty upon your petitioner merely because a judgment might be rendered against them is denying your petitioner of the right to resort to courts in a defense of a claim to which it believes it has an honest defense. The very essence of the Fourteenth Amendment is the right in good faith to take any controversy to courts because it is only in courts and by courts that due process may be had.

This exact question is pending before the Supreme Court of the United States now in the case of *Life & Casualty Insurance Company of Tennessee* v. *Ossie McCray* (No. 89, October Term, 1933), in which the appeal was first refused by the Chief Justice of the Supreme Court of Arkansas and was then granted by Associate Justice Butler of the Supreme Court of the United States on April 21, 1933.

There is one point of importance that makes this appeal necessary in order to squarely present this question.

In the McCray case the question was whether or not after a policy had lapsed and was reinstated the policy began to run anew from the date of the reinstatement and that thereafter in all relations between the company and the assured the date would be reckoned from the date of the reinstatement and not from the original date on the policy.

The appellee in the McCray case contended that prior to the time that the McCray suit was brought against the Life & Casualty Insurance Company the Supreme Court of Arkansas in the cases of *New York Life Insurance Company* v. *Adams,* 155 Ark. 123; *Equitable Life* v. *King,* 178 Ark. 293, and *Security Life Insurance Company* v. *Leeper,* 171 Ark. 77, had definitely settled this question against the contentions of this company and accordingly their act in refusing to pay the claim was in bad faith.

In the present case there is no contention that the Supreme Court of Arkansas prior to this case had ever decided the principle of law involved and accordingly the element of bad faith in refusing to pay the claim is entirely lacking in this case. It may be that the Supreme Court of the United States on the McCray appeal may view the case from the contention of the appellee McCray and hold that the refusal to pay was in bad faith because the question had theretofore been decided by the Supreme Court of Arkansas, and consequently not pass upon the constitutionality of Section 6155 of Moses & Crawford's Digest of the Statutes of Arkansas, which is the object of this appeal.

Accordingly, appellant has deemed it wise also to appeal this case so that it can be assured that the constitutionality of the above statute will be passed upon. Also in this case

there is presented for consideration the first time so far as the Supreme Court of Arkansas is concerned, the question that the judgment of the lower court and of the Supreme Court of Arkansas in the present case is totally void because it is not supported by any evidence whatever under the authority of *Woodson* v. *Railroad,* 134, U. S. 661, 33 L. Ed. 1032, and *Windsor* v. *McVeigh,* 93 U. S. 274. The point of this contention is based upon the fact that the policy provides that before any liability can attach the accident must leave some external and visible marks upon the car of the injury and the record in the case and the opinion of the Supreme Court of Arkansas show that there is no evidence on this point whatever in the record and consequently the said judgment is void and unconstitutional under the above cases.

As pointed out in the McCray case, the United States Court of Appeals for the 8th Circuit has held this statute unconstitutional if applied to a state of facts showing an absence of bad faith in the refusal to pay the claim, and this presents a conflict between two courts of the highest jurisdiction covering the same territory, one State and the other Federal, and thus resulting in the utmost confusion.

That the Supreme Court of Arkansas recognizes the fact that its construction of this statute is directly opposed to the construction placed upon it by the said Circuit Court of Appeals for the 8th Circuit, is shown by the following quotation from the opinion of the court in the McCray case:

> "• • • assuming appellant defended in good faith, this does not excuse it from the plain provision of the statute. *Security Ins. Co.* v. *Smith,* 183 Ark. 254, 35 S. W. (2d) 581; *Mutual Life Ins. Co.* v. *Marsh,* 185 Ark. 332, 47 S. W. (2d) 585, where we expressly refused to follow the Circuit Court of Appeals in *Standard Acc. Ins. Co.* v. *Rossi,* 35 Fed. (2d) 667, and *Inter-Southern Life Ins. Co.* v. *McElroy,* 38 Fed. (2d) 557.

This question is now settled and we decline to reconsider the matter."

Authorities Sustaining Jurisdiction.

Act of Congress, February 13, 1925; 43 Stat. 937; U. S. Comp. Stat. Sec. 1214, giving the right of appeal direct to the Supreme Court of the United States from the judgment of the highest court of a State where the constitutionality of a State statute is drawn in question as being repugnant to the Constitution of the United States and the decision of the State court is in favor of its validity.

Supreme Ruling of Mystic Circle v. *Snyder*, 227 U. S. 497, holding the Tennessee insurance penalty statute constitutional on the ground that it did not merely give the penalty for an unsuccessful defense, but where the defense was made in bad faith.

Standard Life Ins. Co. v. *Rossi*, 35 F. (2d) 667, and *Inter-Southern Life Insurance Company* v. *McElroy*, 38 F. (2) 557, holding Section 6155 of Crawford & Moses' Digest of Arkansas unconstitutional if applied to cases not showing bad faith.

Fourteenth Amendment of the Federal Constitution, forbidding the taking of property without due process of law, which means that every litigant has the constitutional right to litigate any question so long as he acts in good faith.

Respectfully submitted,

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